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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Circuit's analysis of the state treasury factor in this case and its finding that the Ports Authority is entitled to Eleventh Amendment immunity conflict with the standards for evaluating Eleventh Amendment questions set forth by the Supreme Court in Hess v. Port Authority Trans-Hudson Corporation?

2. Is the South Carolina State Treasury obligated to bear a potential judgment in the Ristows' favor?

3. Does the Fourth Circuit's view of the control factor regarding the Ports Authority conflict with the position of the dissent in Hess with respect to control?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

The petitioners, Fred W. Ristow and Susan M. Ristow, pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court

of Appeals for the Fourth Circuit entered in this action on July 20, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 58 F. 3d 1051 (4th Cir. 1995). It is reprinted in the appendix ("App.") at A1-21. The District Court's unpublished decision and order granting dismissal is reprinted at App. B1-6. The Supreme Court's previous order granting certiorari with respect to the petitioners' prior petition in this case (Supreme Court Docket No. 94-428), vacating the Fourth Circuit's earlier decision in this case, and remanding the case to the Fourth Circuit for reconsideration in light of the decision in Hess v. Port Authority Trans-Hudson Corp., 513 U.S. ____, 115 S. Ct. 394, 130 L.

Ed. 2d 245 (1994), is reported at ___ U.S. ___, ___ S. Ct. ___, 130 L. Ed. 2d 485 (1994) and is reprinted at App. C1-2. The earlier opinion of the Court of Appeals vacated by the Supreme Court is reported at 27 F. 3d 84 (4th Cir. 1994) and is reprinted at App. D1-30.

JURISDICTION

The Court of Appeals entered judgment on July 20, 1995. This petition for writ of certiorari was filed within 90 days of that date, and this Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Sec. 1254 (1).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Eleventh Amendment of United States Constitution, which is set forth at App. E1. The state statutes

involved are numerous provisions contained in Section 54, Chapter 3, Articles 1 through 11 of the South Carolina Code Ann. These are set forth at App. E2-54.

STATEMENT OF THE CASE

A. THE PARTIES

The petitioners, Fred W. Ristow and Susan M. Ristow, hereinafter referred to as "Ristows" or "petitioners", are husband and wife and citizens of the State of Wisconsin. At all times material to this action, Fred W. Ristow was employed as a long haul truck driver and longshoreman. (App. F3, 7)

The respondent, South Carolina State Ports Authority, hereinafter referred to as the "Ports Authority", "Authority," or "respondent", is statutorily defined as an instrumentality of

the State of South Carolina and is engaged in the business of managing and developing the ports and harbors in the State. See S.C. Code Ann., Sec. 54-3-130 at App. E6-10. The Ports Authority has the highly autonomous powers of a body corporate, including the power to sue and be sued, own property in its own name, borrow money, pay its expenses, etc. See S.C. Code Ann., Sec. 54-3-140 and Sec. 54-3-1020 at App. E10-18, 52-53.

The respondent designated in the caption as "The SS Unknown" is an unknown ship which was never identified and served. (App. A4) It was ultimately dismissed as a defendant, and the Ristows did not appeal that dismissal.

B. THE INCIDENT IN QUESTION

On December 20, 1988, Fred W. Ris-

tow in the course of his employment, had transported a load of steel pipe on a flat bed truck to the Ports Authority's terminal in Charleston, South Carolina. (App. F8-9) Such pipe was to be picked up later at the terminal by an unknown ship. (App. F9) While Mr. Ristow was standing on top of the load of pipe on the trailer and assisting in the unloading process, a fork lift driver employed by the Ports Authority, picked up the entire load of pipe with the fork lift, lost control of the load, and dropped one bundle of pipe. (App. F10-11) Mr. Ristow had to jump from the truck to avoid fatal injury. (App. F11) As he jumped, Mr. Ristow was struck in the left lower extremity by falling pipe and sustained severe injuries. (App. F11-14)

The Ports Authority notified its insurance carrier, Lloyds of London, of the incident, and an insurance adjustment firm, Crawford and Company, of Charleston, South Carolina was retained to represent the Ports Authority and the insurance carrier. (App. F18-19; H2) A Crawford employee by the name of Lee Pitillo was assigned to handle this matter, and he led the Ristows to believe they could settle their claim for damages arising from the accident directly with Lloyds of London by dealing with him and without counsel. (App. F19; H2-3)

Subsequently, in July of 1990, the Ristows had a telephone conversation with Mr. Pitillo during which he offered to settle their claims for $75,000.00. (App. F19-20; H3) The Ristows accepted

this offer and waited for the settlement check and paperwork to arrive. (App. F20-21; H3) Despite repeated reassurances by Mr. Pitillo, no settlement check ever arrived. (App. F21; H3) In December of 1990, the Ristows retained counsel to assist them with this matter.

C. PREVIOUS PROCEEDINGS AND DISPOSITION

1. DISTRICT COURT PROCEEDINGS

In December of 1991, the Ristows commenced this action in the U.S. District Court for the District of South Carolina, Charleston Division, against the Ports Authority and the unknown ship alleging ordinary negligence by the Ports Authority employee and vicarious liability for such negligence by the

Ports Authority and the unknown ship.[1] (App. F11-16) Mrs. Ristow's claim was for loss of consortium. (App. F16-18) The Ristows also asserted a breach of contract claim against the Ports Authority based upon the aforementioned settlement agreement. (App. F18-22)

Federal jurisdiction was founded on diversity under 28 U.S.C. Sec. 1332 (a) and admiralty under 28 U.S.C. Sec. 1333. (App. F1-2) The parties consented to have the proceedings conducted before a U.S. Magistrate Judge pursuant to 28 U.S.C. Sec. 636 (c), and the case was assigned to the Hon. Robert S. Carr. (App. B1)

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1 The unknown ship was designated as "The SS Unknown," but the vessel was never identified and served.

The Ports Authority moved for dismissal for lack of subject matter jurisdiction alleging, among other things, that the Ports Authority was an agency of the State of South Carolina and the suit was barred by the Eleventh Amendment. (App. G1-3) The Ristows argued the Ports Authority was not entitled to sovereign immunity based upon the application of the factors set forth by the Fourth Circuit in Ram Ditta v. Maryland National Capital Park and Planning Commission, 822 F. 2d 456, 457-458 (4th Cir. 1987).[2] The Ristows also

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[2] The Ram Ditta factors are 1) whether the state treasury will be responsible for paying any judgment that might be awarded; 2) whether the entity exercises a significant degree of autonomy from the state; 3) whether it is involved in local versus state concerns; and 4) how the entity is treated as a matter of state law.

urged the Court to adopt the reasoning of the District Court for the Southern District of New York expressed in Doris Trading Corporation v. The SS Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y. 1976) wherein the Court ruled the Ports Authority was not entitled to sovereign immunity.

In an order entered on September 2, 1992, the District Court, Magistrate Carr, presiding, granted the motion to dismiss holding that the Ports Authority was entitled to Eleventh Amendment immunity. (App. B5) The Court's decision founded upon the cases of South Carolina Ports Authority v. Seaboard Air Line R.R. Co., 124 F. Supp. 533 (D.S.C. 1954) and Coakley v. South Carolina State Ports Authority, D.S.C. Case No. 2:87-

1442-2 (UP 1988)[3] as well as South Carolina statutory law. (App. B4 & 5) The claim against the unknown ship was dismissed due to a lack of service. (App. B5 & 6) A motion to alter judgment was subsequently denied (App. B7-9), and the Ristows then appealed.

2. 1994 COURT OF APPEALS PROCEEDINGS

On June 13, 1994, the United States Court of Appeals for the Fourth Circuit in an opinion by the Honorable James M. Sprouse, Senior Circuit Judge, affirmed the District Court's dismissal of the action. (App. D1) Employing the factors set forth in Ram Ditta, the Fourth Circuit concluded that the Ports Author-

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[3] The Coakley decision is reproduced at App. I1-30.

ity was entitled to Eleventh Amendment immunity. (App. D6-27)

In analyzing the state treasury factor, which it recognized as being the most important criterion, the Court determined the Ports Authority owes its existence and current position to funding by the State. (App. D7-9) The Court believed the State's withdrawal of excess Ports Authority funds and commingling of state funds with those of the Authority indicate that the Ports Authority's funds belong to the State and recovery out of those funds would constitute one from the State treasury. (App. D10) The Court rejected the Ristows' argument that South Carolina statutory law insulated the state treasury from any Ports Authority indebtedness, including any judgment in favor of the

Ristows. (App. D12-13) The Fourth Circuit was not persuaded by the Ristows' assertions that the existence of insurance coverage, the absence of any obligation on the part of the State to fund the Ports Authority or pay judgments against it, and the existence of the Ports Authority's own bank accounts and ability to borrow funds all weighed heavily against immunity. (App. D13-19)

Although admitting the Ristows' arguments as to the existence of the Ports Authority's own funds and the absence of a provision committing the state treasury to fund the Authority or pay a judgment found support in the Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F. 2d 628 (2nd Cir. 1989), aff'd on other grounds, 495 U.S. 299, 110 S. Ct. 1868,

109 L. Ed. 2d 264 (1990), the Court favored what it described as the "broader" and more practical approach of the Third Circuit for analyzing the treasury factor set forth in Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, 819 F. 2d 413 (3rd Cir. 1987), cert. den. 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987). (App. D14-16) Thus, the Court concluded that the state treasury factor supported Eleventh Amendment immunity. (App. D17) Ram Ditta's control and state versus local concerns factors were also believed to favor immunity. (App. D20-24)

3. SUPREME COURT PROCEEDINGS

On September 7, 1994, the Ristows filed a petition for certiorari with the Supreme Court to review the June 13,

1994 decision of the Fourth Circuit. Their petition was assigned Docket No. 94-428.

The conflicting approaches in analyzing the state treasury factor employed by the Second Circuit in Feeney and the Third Circuit in Police Benevolent Association formed the basis of their petition. The Ristows identified this conflict as being one between an actual financial analysis with respect to the state treasury factor versus a broad symbiotic relationship approach. In an order entered on November 28, 1994, the Supreme Court granted certiorari, vacated the June 13, 1994 decision of the Fourth Circuit, and remanded this case for further consideration in light of Hess. (App. C1-2)

4. 1995 COURT OF APPEALS PROCEEDINGS

On reconsideration, the Ristows once again emphasized the protection of the South Carolina state treasury as established by the following facts: 1) the existence of insurance coverage through Lloyds of London; 2) the existence of the Ports Authority's own funds and the ability to raise funds; 3) the absence of a continued funding obligation on the part of the State; and 4) the insulation provision outlined in S.C. Code Ann., Sec. 54-3-140(9). In deciding Hess, the Ristows believe that the Court had established an actual financial approach as being the proper method of analyzing the state treasury factor. They contended the state treasury test in Hess clearly favored the denial of immunity for the Ports Authority.

In its decision again written by Senior Circuit Judge Sprouse, the Fourth Circuit interpreted Hess as providing both a legal and practical analysis of whether the state treasury is obligated to bear the resulting indebtedness of the enterprise. (App. A12) The Court admitted there is no legal obligation on the part of the State to cover the Authority's debts and a judgment against the Authority could not be legally enforced against the State. (App. A11, 15-16, 18) When analyzed from the practical standpoint, however, the Court was convinced that a judgment against the Authority involved the "core concern" of the Eleventh Amendment - the ebb and flow of funds into and out of the state treasury. (App. A18-19) Thus, the Au-

thority is entitled to Eleventh Amendment immunity. (App. A19)

The Fourth Circuit's practical analysis was founded on the State's so-called immersion in the financial affairs of the Ports Authority. (App. A13) Since 1959, the State had issued $132 million in bonds to finance Authority improvements, and tax revenues were used to repay the principal and interest on such indebtedness. (App. A13-14) The State had also withdrawn over $1.5 million from the Ports Authority. (App. A14) Unlike the entity in Hess, the Court was convinced that the Ports Authority was not self-sufficient. (App. A15-16) According to the Court, the practical effect of the State's treatment of the Authority's fiscal affairs implicated the state treasury. (App.

A16-17) The Court did not discuss the Authority's insurance coverage in its opinion.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. THE FOURTH CIRCUIT'S ANALYSIS OF THE STATE TREASURY FACTOR IN THIS CASE AND ITS FINDING THAT THE PORTS AUTHORITY IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY CONFLICTS WITH THE STANDARDS FOR EVALUATING ELEVENTH AMENDMENT QUESTIONS SET FORTH BY THE SUPREME COURT IN HESS V. PORT AUTHORITY TRANS-HUDSON CORP.

A. INTRODUCTION

When this case last came before the Supreme Court, the Ristows' petition was founded upon the aforementioned conflict between the Second and Third Circuits in their respective methods of analyzing the important state treasury factor. Thus, their petition relied primarily upon the considerations set forth in Supreme Court Rule 10.1(a) to support the granting of certiorari. See prior Peti-

tion in No. 94-428. The Ristows believe the Supreme Court resolved this conflict in Hess by first re-emphasizing the importance of the state treasury factor in addressing Eleventh Amendment questions and then adopting an actual financial analytical approach as the proper method for evaluating this important factor. The broad symbiotic relationship approach utilized by the Fourth Circuit in its previous decision was soundly rejected.

After reviewing the Fourth Circuit's July 20, 1995 decision, it is apparent that the so-called "immersion" of the State in the Port Authority's financial affairs cited by the Court as the basis for granting immunity bears a striking resemblance to the now discredited broad financial/symbiotic relationship method-

ology previously employed. Rather than following the teachings of Hess in its reconsideration of this case, the Fourth Circuit has merely recast the language of its decision in an attempt to comply with Hess on its face but has ignored the substance of Hess. As will be discussed herein, the Fourth Circuit's decision on this important constitutional issue clearly conflicts with Hess. The Ristows' petition therefore presents a matter which satisfies the considerations outlined in Supreme Court Rule 10.1(c) and requires Supreme Court review.

B. A DISCUSSION OF THE HESS DECISION

1. BI-STATE ENTITY DISCUSSION

Although the Fourth Circuit in Gray v. Laws, 51 F. 3d 426, 431 (4th Cir. 1995) claimed the Hess opinion is cer-

tain to generate confusion, the Ristows believe it is perfectly clear. In addressing the conflict between the Second and Third Circuits as to whether the Port Authority Trans-Hudson (i.e. PATH), a bi-state entity, was entitled to Eleventh Amendment immunity, the Court first outlined the state treasury and dignity protection purposes of the Amendment and discussed the significantly different position in the federal system occupied by bi-state entities. Hess, 130 L. Ed. 2d at 255-257.

The Court then reiterated the general rule set forth in Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979) with respect to Compact Clause agencies which presumes such agencies are not entitled to Eleventh

Amendment immunity "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose." Hess, 130 L. Ed. 2d at 257. The discussion about the special place occupied by bi-state entities provided further justification for the existence Lake Country presumption.

An examination of the indicators of immunity was then conducted to see if good reason existed to overcome the presumption. Hess, 130 L. Ed. 2d at 258-259. Unlike the situation in Lake Country, the Supreme Court believed the indicators of immunity or absence thereof pointed in different directions in Hess. Hess, 130 L. Ed. 2d at 258-259. There-

fore, a determination under the general rule pertaining to interstate compact entities could not be made in Hess.

After finding the indicators connected with the presumption to be inconclusive, the Court shifted its inquiry to the Eleventh Amendment's twin reasons for being, i.e. the protection of state dignity and solvency. Hess, 130 L. Ed. 2d at 255 & 259. Having already discussed the state dignity concerns, the Court first discussed control and then examined the state treasury factor. Hess, 130 L. Ed. 2d at 259-263.

2. THE REJECTION OF CONTROL

With respect to control or autonomy, the Ristows believe the following passage shows the Court's ultimate rejection of state control as a relevant factor in an Eleventh Amendment analysis:

> Gauging actual control, particularly when an entity has multiple creator-controllers, can be a "perilous inquiry," "an uncertain and unreliable exercise." See Note, 92 Colum. L. Rev. 1243, 1284 (1992); see also id., at 1302, and n. 264 (describing "degree to which the state controls the entity" as a criterion neither "[i]ntelligible" nor "judicially manageable")
>
> Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury." [Citations omitted] Hess, 130 L. Ed. 2d at 260.

The dissent has interpreted the majority opinion as having rejected control altogether. Hess, 130 L. Ed. 2d at 269. In light of the foregoing discussion, the Fourth Circuit's comment in Gray that the Supreme Court did not dismiss control altogether is indeed curious. Gray, 51 F. 3d at 432. Although

control is not specifically discussed in Ristow, the Fourth Circuit's comments in footnotes 4 and 10 of the opinion would appear to reaffirm the view regarding control expressed in Gray. See App. A8, 9 & 19.

3. THE DOMINANT STATE TREASURY FACTOR

The Court then examined the role state treasury factor. Having recognized state solvency to be one of the Eleventh Amendment's twin reasons for being[4] and treasury protection to be the Amendment's core concern,[5] the Court engaged in an extensive survey of case law holding the treasury factor to be the most important inquiry in an Eleventh

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[4] Hess, 130 L. Ed. 2d at 255 & 259.

[5] Hess, 130 L. Ed. 2d at 262.

Amendment analysis. Hess, 130 L. Ed. 2d at 259-261. Quite significantly, the analysis cited cases involving both single state entities, such as Jacintoport v. Greater Baton Rouge Port Com., 762 F. 2d 435 (5th Cir. 1985), cert. den. 474 U.S. 1057, 106 S. Ct. 797, 88 L. Ed. 774 (1986) and Royal Caribbean Corp. v. Puerto Rico Ports Authority, 973 F. 2d 8 (1st Cir. 1992) for example, and bi-state entities. Hess, 130 L. Ed. 2d at 260-261.

While the treasury criterion had generally been recognized by the federal courts as the most important consideration in an Eleventh Amendment analysis prior to Hess, the Supreme Court's decision established it as the predominant factor for addressing such questions. The Fourth Circuit correctly rejected

the Ports Authority's claim that Hess has no application to single state entities. See footnote 5 in the Ristow opinion at App. A9 and Gray, 51 F. 3d at 431 & 432.

4. THE ADOPTION OF AN ACTUAL FINANCIAL ANALYSIS AS THE PROPER APPROACH FOR EXAMINING THE STATE TREASURY FACTOR

After removing any doubt about the importance of the state treasury factor in an Eleventh Amendment analysis, the Court provided considerable guidance in applying such factor. Hess, 130 L. Ed. 2d at 261-262. At the Fourth Circuit level and in their previous Petition for Certiorari in No. 94-428, the Ristows outlined how an actual financial examination in this case revealed that the South Carolina state treasury would not be responsible for paying any judgment in their favor. Their position was

based on Feeney and Jacintoport, cited earlier, as well as numerous other cases. See Petition in No. 94-428 at p. 25-30, 39-55. The Ristows cited the existence of insurance coverage and the other facts set forth on pages 14 and 17 of this Petition as evidence of such protection. See also Petition in No. 94-428 at p. 40.

In Jacintoport and Feeney, the Courts examined whether as a practical matter, the plaintiff's judgment would actually have to be satisfied from the state treasury. The Jacintoport Court's analysis concluded that any judgment could be satisfied by the Commission itself. Jacintoport, 762 F. 2d at 441. Such analysis determined that even the most favorable estimate of the plaintiff's damages would not reach one-tenth

of the Commission's surplus revenue in a good year. Jacintoport, 762 F. 2d at 441. The state's tertiary liability on the Commission's bonds was found to have only an ancillary effect on the treasury. Jacintoport, 762 F. 2d at 441-442.

The Feeney Court believed the financial factor favored the denial of immunity since the Authority could not pledge the credit of either state, could only borrow money in its own name, and no provision committed the state treasuries to satisfy any judgments. Feeney, 873 F. 2d at 631. The limited appropriation from the state treasuries requiring gubernatorial approval was felt to be a limited and optional obligation evidencing an intent to insulate the vast bulk of the treasury from the Au-

thority's debts. Feeney, 873 F. 2d at 631.

In deciding Hess, the Supreme Court clearly favored the actual financial analysis over the broad relationship approach used by the Third Circuit in Police Benevolent Association and the Fourth Circuit in its 1994 decision. The Court in the following passage contrasted the Port Authority's "anticipated and actual financial independence "[6] [emphasis added] with the burdens other entities place on their founding States:

> In Alaska Cargo Transport, Inc. V. Alaska R. Corp., 5 F 3d 378 (CA9 1993), for example, Eleventh Amendment immunity was accorded a thinly capitalized railroad that depends for its existence on a state-provided "financial safety net of broad dimension." Id., at 381. And

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[6] Hess, 130 L. Ed. 2d at 261.

in Morris v. Washington Metropolitan Area Transit Authority, 781 F. 2d 218 (CADC 1986), Eleventh Amendment immunity was accorded an interstate transit system whose revenues shortfall congress and the cooperating States anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits. See id., at 225-227. As the Morris court concluded:

"[W]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." Id., at 227. 20 There is no such requirement where the agency is structured, as the Port Authority is, to be self-sustaining. Cf. Royal Caribbean Corp. v. Puerto Rico Ports Authority, 973 F. 2d 8, 10-11 (CA1 1992) (Breyer, C.J.) (rejecting Eleventh Amendment immunity plea, despite Commonwealth's control over agency's executives, planning, and administration, where agency did not depend on Commonwealth financing for its income and

> covered its own expenses, including judgments against it)."

Hess, 130 L. Ed. 2d at 261.

The Supreme Court also rejected a financial nexus for Eleventh Amendment immunity based on the State's access to Authority surplus and profits and use thereof for projects. Hess, 130 L. Ed. 2d at 261-262. The Port Authority Trans-Hudson had argued that a judgment against it produced an effect equivalent to a judgment against the state because Authority surplus is dedicated to public projects which the State would otherwise have to fund if such surplus was used instead to pay a judgment. Hess, 130 L. Ed. 2d at 261-262. In light of this, the Authority believed it was unrealistic and artificial to distinguish the resources of the two. Hess, 130 L. Ed. 2d at 262.

Commenting on this argument, the Court stated as follows:

> "This reasoning misses the mark. A charitable organization may undertake rescue or other good work which, in its absence, we would expect the State to shoulder. But none would conclude, for example, that in times of flood or famine the American Red Cross, to the extent it works for the public, acquires the States' Eleventh Amendment immunity.21 The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of enterprise exceed receipts, is the state in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" --- both legally and practically --- then the Eleventh Amendment's core concern is not implicated."

Hess, 130 L. Ed. 2d at 262.

The foregoing discussion in Hess regarding actual financial independence and whether a state is in fact obligated to bear an indebtedness show a clear re-

jection of the symbiotic relationship approach and the establishment of an actual financial analysis as the proper method for addressing the state treasury factor. Furthermore, the Court has emphasized that the focus of the analysis should be on the entity's debts and expenditures and not on the use of profits and surpluses.

C. THE CONFLICT BETWEEN HESS AND THE FOURTH CIRCUIT'S DECISION

1. GENERAL OVERVIEW OF CONFLICT

As can be seen by reviewing footnote 4 of its opinion in Ristow and page 434 of its opinion in Gray, the Fourth Circuit does not believe Hess materially altered the methodology it has utilized for examining Eleventh Amendment questions. Such comments ignore the Supreme Court's clear rejection of control, its re-emphasis of the state treasury fac-

tor, and the aforementioned guidance it has provided in applying the treasury factor. The Fourth Circuit has simply reconstructed its opinion in an attempt to facially comply with Hess but avoid its substance.

The Fourth Circuit correctly recognized that Hess establishes both a legal and practical test[7] for examining the treasury factor. However, it then erred by seizing upon the Court's language with respect to the question of whether the state must bear the obligation being

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[7] Throughout this litigation, the Ristows have shown that both legally, by virtue of the absence of a continued funding obligation and the presence of statutory insulation language, and practically by virtue of the insurance coverage and the existence of the Authority's own assets and borrowing power, the state treasury will not be obligated to pay a judgment in their favor.

answered "no" in the practical sense and ignoring the substance of the Court's discussion on pages 261 and 262. The Court expressed a distorted view of the State's practical obligation completely at odds with Hess. Previously, the Fourth Circuit's analysis was founded on symbiotic relationships, and now it is grounded on the state's immersion in the Authority's financial affairs. The Court's new phraseology is merely a disguised way of talking about relationships and the theoretical bearing of indebtedness. The Fourth Circuit cannot shift the focus of its analysis from relationships to the actual bearing of indebtedness as the Supreme Court has directed.

2. THE CONFLICT BETWEEN HESS AND THE FOURTH CIRCUIT'S "SURPLUS" POSITION

The Fourth Circuit's immersion finding is founded on 1) the State's access to Ports Authority surplus and profits, and 2) the State's voluntary contributions for capital improvements and the BMW project. (App. A13-18) With respect to the State's access to Authority surplus, the Court noted that the legislature will not be able to withdraw net revenues if the surplus has been depleted by judgments. (App. A16-17) Also, the Ports Authority would be unable to utilize such surplus for its improvements and would be forced to depend on the State. (App. A17-18)

The Court's surplus rationale is virtually identical to the argument raised by the Port Authority Trans-

Hudson which is discussed and rejected by the Supreme Court on pages 261 and 262 of the Hess opinion (i.e. a judgment would reduce Authority surplus available to fund other projects thus requiring the state to fund them and producing an effect equivalent to a judgment against the state). In pointing out the fallacy of this argument, the Supreme Court noted that the proper focus is not on the use of profits or surplus but on losses and debts. Hess, 130 L. Ed. 2d at 262. Thus, the very reasoning utilized by the Fourth Circuit directly conflicts with the teachings of Hess.

In footnote 9 on page 7 of the opinion, the Fourth Circuit attempted to explain its deviation from the standards of Hess by presenting an irrelevant distinction and a confused theory of ac-

counting. (App. A17) Unlike Hess where some surplus is devoted to finance certain specific projects, the Ports Authority's surplus is subject to the unfettered discretion of the legislature thereby buttressing the Court's view that the surplus is the State's. (App. A17) Since Hess attached no significance as to who had access to the surplus and instead placed the focus on the losses and debts, the Ristows believe this distinction is irrelevant. The Court's rationale also conveniently overlooked the practical and legal separation of the Authority's revenues and assets from those of the State.

As to the belief that because of the State's $132 million in contributions the surplus is only semantic and the Authority is actually operating at a loss,

the Court once again ignored the practical and legal separation of Authority revenues and assets from the State's. By attempting to manufacture a loss on the basis of the State's contributions, the Fourth Circuit confused the concept of loss with that of net worth. Hess clearly placed the focus of the test on an entity's operational losses rather than its net worth.[8] Furthermore, the Fourth Circuit's "loss" interpretation fails to account for the substantial value of the assets owned by the Authority which undoubtedly result in a positive net worth for the entity. The

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[8] The Court's language on page 262 of Hess regarding expenditures exceeding receipts as well as its reference to operating deficits on page 261 when it is discussing Morris v. Washington Metropolitan Area Transit Authority, 781 F. 2d 218 (CADC 1986) show that the Court was talking about operational deficits.

Court's surplus rationale cannot be reconciled with Hess and directly conflicts with its teachings.

3. THE CONFLICT BETWEEN HESS AND THE FOURTH CIRCUIT'S "CONTRIBUTIONS" POSITION

In citing the State's voluntary contributions for capital improvements and the BMW project as support for its immersion theory, the Fourth Circuit has deviated from the substance of Hess decision. The test set forth in Hess is whether the state is obligated practically or legally to bear the resulting indebtedness should expenditures exceed receipts. Hess, 130 L. Ed. 2d at 262. It is not whether the state has made contributions to an entity. Indeed in Hess, New York and New Jersey had made contributions to the Authority in its early days, and a continued funding ob-

ligation existed. Hess, 130 L. Ed. 2d at 259. In Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), the state had made significant financial contributions to a school board, but immunity was denied.

The Fourth Circuit also failed to recognize South Carolina's contributions for improvements were voluntary. Previous case law has held that voluntary payments do not trigger Eleventh Amendment immunity. See Duckworth v. Franzen, 780 F. 2d 645, 650-651 (7th Cir. 1985); Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F. 2d 655, 661 (3rd Cir. 1989), cert. den. 493 U.S. 850, 110 S. Ct. 148, 107 L. Ed. 2d 107 (1989) and Bolden v. Southeastern Pennsylvania Transp. Authority, 953 F. 2d

807, 819 (3rd Cir. 1991), cert. den. 504 U.S. ___, 112 S. Ct. 2281, 119 L. Ed. 2d 206 (1992). Hess created one important exception to the foregoing rule in that the Court would find Eleventh Amendment immunity triggered by the voluntary payment of a judgment by the state treasury where such payment was necessary for the very survival of the entity. Hess, 130 L. Ed. 2d at 261. Such exception does not apply in this case.

The facts herein show the voluntary payment of a judgment in the Ristows' favor by the state treasury would not be necessary to insure Authority survival. There is sufficient insurance coverage, and the Authority has its own funds and the ability to borrow money. This practical treasury protection will be further discussed in Section II of this Pe-

tition. See also Petition in No. 94-428 at p. 40-43 & 48-49.

4. HESS AND THE FOURTH CIRCUIT'S CONFLICTING VIEWS OF SELF-SUFFICIENCY OR PRACTICAL DEPENDENCE

Noting the self-sufficiency of PATH, the Fourth Circuit used the combination of the State's voluntary contributions and access to surplus to conclude that the Ports Authority's is not self-sufficient. (App. A15-16) The Court's finding is completely at odds with the substance of the Supreme Court's discussion of self-sufficiency versus practical dependence on page 261 of the opinion. Once again, the Court is trying to shift the focus of the test from state treasury obligation to state financial immersion and relationship. A review of the Court's discussion about the contrast

between PATH and entities placing a heavy toll on their founding states shows the Court envisioned a situation of practical dependence much different from the one described by the Fourth Circuit.

On page 261, the Court compared PATH and facilities placing heavy tolls on their founders. As examples, the Court then cited a railroad in Alaska Cargo, cited earlier, which depended on a state-provided financial safety net for its existence, and an interstate transit system in Morris, cited earlier, having sizable operating deficits and being constantly dependent on funding from the States to meet these deficits. Hess, 130 L. Ed. 2d at 261. The Court noted the Morris Court's conclusion that "[w]here an agency is so structured

that, as a practical matter, if the agency is to survive, a judgment must expend itself against the state treasuries, common sense and the rational of the eleventh amendment require that sovereign immunity attach to the agency." Hess, 130 L. Ed. 2d at 261, quoting Morris, 781 F. 2d at 227.

The Ports Authority herein simply does not fall within the class of entities placing heavy fiscal tolls on the states as contemplated by the Supreme Court. Practically since 1959, the Ports Authority has been operating profitably. During its lifetime, the State has withdrawn a surplus of over $1.5 million. (App. A14) Unlike the situation in Morris, the State does not make contributions to cover any operating deficits.

Assuming the Ristows obtained a judgment against the Authority, the State would not be practically required to cover it to save the Authority because of the Authority's ample insurance coverage, the existence of its own funds, and the ability to borrow funds. See Section II for more discussion of the practical treasury protection. Regardless of the Ristows' judgment, the Ports Authority will survive. To grant Eleventh Amendment immunity under the circumstances defies economic reality. The Fourth Circuit's position on practical dependence and lack of self-sufficiency is not compatible with the Supreme Court's view and must be rejected.

5. THE FOURTH CIRCUIT'S FAILURE TO CONSIDER INSURANCE

In its practical analysis, it is very peculiar that the Fourth Circuit completely ignored the existence of insurance coverage.[9] When addressing the bearing of indebtedness from the practical standpoint, the existence of insurance would appear to be an extremely relevant consideration. In the Bolden, Fitchik, and Royal Caribbean cases cited earlier, the existence of insurance was discussed.

In their previous Petition, the Ristows contended that the broad view expressed by the Court in its 1994 decision which did not consider the existence of insurance had the undesirable

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[9] This is consistent with the Court's 1994 decision wherein it failed to deal with insurance as well.

effect of conferring the benefits of sovereign immunity upon Lloyds of London, a private insurance consortium not connected with the State. See Petition in No. 94-428 at p. 37 & 38. Such failure to consider insurance practically extends the Eleventh Amendment protection beyond the Amendment's intended scope and purpose, i.e. to protect the States and their treasuries. The Fourth Circuit's ignoring of insurance in its more recent decision renews this concern and is especially troublesome in light of Justice Stevens' comments in his concurring opinion.

Justice Stevens joined the opinion authored by Justice Ginsburg without reservation but wanted to identify an additional consideration which motivated his vote, i.e. the establishment of jus-

tice. Hess, 130 L. Ed. 263-264. He discussed how the Court's expansive Eleventh Amendment jurisprudence is misguided as a matter of constitutional law, has worked as an engine of injustice, and has been the subject of much scholarly criticism. Hess, 130 L. Ed. 2d at 264. When confronted with the question of whether the doctrine should be extended or contained, a court should give controlling weight to the establishment of justice. Hess, 130 L. Ed. 2d at 264. By ignoring the insurance coverage, the Fourth Circuit has failed to consider a relevant treasury protection factor, has effectively expanded the Amendment's scope to protect a private insurance entity, and has created the very injustice Justice Stevens cautioned against in his opinion.

D. SUPREME COURT RULE 10 CONSIDERATIONS

Under Supreme Court Rule 10.1(c), one of the criteria for granting a petition for certiorari is when a United States Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court. The foregoing discussion has demonstrated the existence of a clear conflict between the Fourth Circuit's analysis of the state treasury factor herein and the Supreme Court's treasury teachings set forth in Hess.[10] Since Eleventh Amendment immunity is an important question of federal constitutional law and the state treasury factor is the

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[10] As will be discussed in Section III, a conflict also exists between the Fourth Circuit's view of control in this case and the dissent's position on control.

predominant factor in analyzing this question, the conflict presents a substantial question and "special and important reasons" which would justify certiorari. See Supreme Court Rule 10.1 and Rice v. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 The case involves principles whose settlement is important to the public, and a conflict which is real. Accordingly, pursuant to NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed 479 (1951), certiorari is appropriate and necessary.

Given the substantial number of cases arising in the Eleventh Amendment area, the issue raised herein is not episodic but is frequently seen in the federal system. The Fourth Circuit's decision has also created a conflict

over the respondent's status with the Southern District of New York in the Doris case. Throughout this litigation, the Ristows have believed Doris was correctly decided and should have been followed. Finally, as previously mentioned and will be further discussed in Part II, the Ristows' treasury protection position has substantial merit.

In view of the foregoing considerations, the Supreme Court should grant certiorari in this matter. The Ristows will now outline the merits of the protection of the state treasury in greater detail, and will finally address state control or autonomy.

II. THE SOUTH CAROLINA STATE TREASURY IS NOT OBLIGATED TO BEAR A POTENTIAL JUDGMENT IN THE RISTOWS' FAVOR.

A. INTRODUCTION

Throughout this litigation, the Ristows have demonstrated the legal and practical protection of the state treasury from a judgment in their favor.[11] Since the Fourth Circuit admitted the state treasury is not legally obligated to pay a judgment in their favor, the Ristows can now dispense with the legal aspects of their protection analysis and concentrate on the practical.

B. INSURANCE COVERAGE

On their personal injury claims, the maximum amount the Ristows could recover is the sum of $430,000.00 plus costs, while they could recover $75,000.00 plus costs on their alternative breach of contract claim. These are the amounts

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[11] Treasury protection was previously discussed on pages 39-55 of the Ristows' Petition in No. 94-428.

of damages prayed for by the Ristows in their Complaint. See App. F22-23. At appendix page 4 in its Brief in Opposition to Certiorari in No. 94-428, the Ports Authority disclosed for the first time in this litigation a coverage limit of "US $20,000,000.00." Assuming the Authority has correctly identified policy limits, the possibility of any excess liability is a moot point.

C. THE PORTS AUTHORITY'S SEPARATE FUNDS

In its responsive brief on reconsideration, the Ports Authority disclosed for the first time in this litigation the existence of a $25,000.00 deductible. Since the Ports Authority has its own assets and the ability to raise funds, the $25,000.00 deductible does not impair the state treasury. The Ports Authority has its own bank ac-

counts and owns property in its own name. See S.C. Code Ann., Sec. 54-3-140 (2) and 54-3-1020 at App. E11, 52-53. The Ports Authority can generate funds in a variety of ways some of which are as follows:

1) licensing fees; S.C. Code Ann., Sec. 54-3-140 (14) at App. E17-18;

2) rent; S.C. Code Ann., Sec. 54-3-140 (2) at App. E11;

3) borrowing; S.C. Code Ann., 54-3-140 (2) and (9) at App. E11, 14-15;

4) funds from the counties of Beaufort, Charleston, and Georgetown; S.C. Code Ann., 54-3-130 (5) at App. E8-9;

5) funds from others; S.C. Code

Ann., Sec. 54-3-1030 at App. E53.

Since 1959, the State has not made an annual appropriation for the operation of the Authority. (App. A12-13) On the other hand, the Authority has generated considerable revenue having distributed excess earnings of $1,500,000.00 to the State. (App. A14) Thus, the Ports Authority clearly has its own separate funds and the ability to raise funds which could be used to pay any judgment in the Ristows favor not covered by insurance. It would not depend upon state treasury payment of the Ristows' judgment for its survival.

III. THE FOURTH CIRCUIT'S VIEW OF THE CONTROL FACTOR REGARDING THE PORTS AUTHORITY CONFLICTS WITH THE POSITION OF THE DISSENT IN HESS AS TO CONTROL.

Since disagreement exists in the Su-

preme Court regarding the importance of control, the Ristows feel it is important to discuss this issue. The dissent, of course, believes control should be the predominant factor as indicated by the following passage from Justice O'Connor's dissenting opinion:

> "The critical inquiry, then, should be whether and to what extent the elected state government exercises oversight over the entity. If the lines of oversight are clear and substantial - for example, if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings - then the entity should be deemed an arm of the State for Eleventh Amendment purposes." Hess, 130 L. Ed. 2d at 268-269.

From a review of the comment in footnote 10 of the Ristow opinion, it is apparent that the Fourth Circuit continues to believe the control or autonomy factor favors a finding of Eleventh

Amendment immunity. In its 1994 decision, the Fourth Circuit admitted autonomy considerations were mixed but determined the Ports Authority ultimately answers to the State. (App. D20-23) However, the Fourth Circuit's view fails to show clear and substantial oversight over the Ports Authority's activities by the State and thus conflicts with the dissent's control test which focuses on such oversight.

An examination of the statutes pertaining to the Ports Authority reveals the absence of meaningful oversight on the part of the State. Sec. 54-3-140(1) gives the Authority the powers of a body corporate, allows it to sue and be sued, make contracts, adopt and use a common seal. (App. E11) Pursuant to Sec. 54-3-140(2), the Authority may acquire

and dispose of real and personal property. (App. E11) The Authority may pay its own expenses and incur indebtedness on its own under Sec. 54-3-140(8) & (9). (App. E14-15) Sec. 54-3-140(5) allows the Authority to hire and fire employees at will. (App. E13) As disclosed by Secs. 54-3-20, 54-3-30, and 54-3-40, the Authority operates like an ordinary business corporation. (App. E3-4)

In Hess, the parent states appointed and removed the commissioners who governed PATH. Hess, 130 L. Ed. 2d at 268-269. The governor of each could veto actions of commissioners from that State including actions taken as PATH directors. Hess, 130 L. Ed. 2d at 253. Given these powers, the dissent felt sufficient state control existed to support a

finding of immunity for PATH. Hess, 130 L. Ed. 2d at 269-270.

Although the board members of the Ports Authority are appointed by the governor of South Carolina, pursuant to Sec. 54-3-20, South Carolina does not retain a statutory veto or approval power over the Authority's undertakings. (App. E3) A review of the statutory sections related to the Ports Authority reveals considerable autonomy with no clear lines of oversight. Thus, the Fourth Circuit's view of control clearly conflicts with the test cited by the dissent in Hess.

CONCLUSION OF PETITION

In this petition, the Ristows have demonstrated the existence of important considerations which necessitate the granting of certiorari in this case.

They have also shown that the Ports Authority is not entitled to Eleventh Amendment immunity since the state treasury is not practically obligated to bear a judgment in their favor. For the reasons recited in this petition, the Ristows' petition for certiorari should be granted and it is respectfully requested that the Court grant the same.

Respectfully submitted

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